Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

CASE NO. _____

RAYMOND WIZBOWSKI AND BARBARA WIZBOWSKI,

PETITIONERS,

v.

COMMISSIONER OF INTERNAL REVENUE,

RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI
FROM THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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26 pp

STATEMENT OF QUESTIONS PRESENTED

Whether petitioners' representation, by an attorney with a **substantial** financial interest in the outcome of the case below, constitutes a fraud on the court, when that attorney's financial interest is adverse to those of the client.

Whether the Courts below erred in not considering the conduct of Harris in making its determination as to whether fraud on the court occurred in the United States Tax Court proceedings.

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In The Supreme Court of the United States

October Term, 1994

Case No. _____

RAYMOND WIZBOWSKI AND BARBARA WIZBOWSKI,

PETITIONERS,

v.

COMMISSIONER OF INTERNAL REVENUE,

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PETITION FOR A WRIT OF CERTIORARI
FROM THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Law Office of Anthony P. Capozzi, on behalf of Petitioners Raymond V. Wizbowski and Barbara Wizbowski, respectfully petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in

this case.

OPINIONS BELOW

Petitioners filed a motion for leave to file a motion to vacate a Tax Court decision on November 21, 1991. Petitioners' motion was denied by a Tax Court order of April 4, 1992. (Appendix 5.) Petitioners Raymond V. and Barbara Wizbowski seek review of a decision by the Ninth Circuit Court of Appeal affirming the decision of the Tax Court. (Appendix 1.)

JURISDICTIONAL STATEMENT

On November 29, 1993 the Ninth Circuit Court of Appeal affirmed the decision by the Tax Court denying Petitioners' request for leave to file a motion to vacate a prior tax court decision. (Appendix 1.) On December 15, 1993 Petitioners' filed a Petition for Rehearing of the November 29, 1993 Ninth

Circuit Court of Appeal decision. (Appendix 10.) On May 3, 1994 the Court of Appeal denied the petition for rehearing. (Appendix 9.)

The jurisdiction of this court is invoked pursuant to Title 28, United States Code section 1254(1).

STATEMENT OF THE CASE

In 1977, Petitioners invested in Sun Belt Partners (Sun Belt), a California partnership. Sun Belt was a partnership organized and promoted by Thomas Harris (Harris). (CR 6)[1] Through their involvement in Sun Belt, Petitioners' claimed partnership losses of $60,246 and $59,941, for the 1977 and 1978 taxable years,

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[1] "CR" reference are to the docket control numbers assigned to the documents in the original record by the Clerk of the Tax Court. "RT" references are to the reporter's transcript of the proceedings of the March 17, 1992, hearing on petitioners' motion to vacate.

respectively, based on Sun Belt's purchase of a mobile home park. (CR 1 Ex. A).

In August of 1984, Petitioners engaged the services of T. Dean Hawkins to represent them in United States Tax Court proceedings concerning the 1977 and 1978 deficiencies. (CR 17) Hawkins timely petitioned the United States Tax Court for redetermination of the Petitioners' tax deficiencies. (CR 1) The United States Tax Court had jurisdiction over Petitioners' original petition pursuant to Title 26 U.S.C. Section 7442.

Petitioners' case was consolidated for trial with seven other cases, all involving taxpayers who had invested in Sun Belt. (CR 4) The other taxpayers were represented by Harris, Sun Belt's organizer and promotor. The issue at trial was whether Sun Belt had entered into a bona fide purchase of the mobile home

park, thereby allowing Sun Belt, as owner, to claim certain losses. (CR 6) Hawkins presented taxpayers' case in conjunction with Harris' presentation of the other taxpayers' cases. (CR 6.)

At trial, Petitioner Mrs. Wizbowski explained that she had sold her partnership interest in Sun Belt because she had become "totally estranged" from Harris, the promoter. Mrs. Wizbowski also testified that Harris had mishandled some of the Wizbowskis' pension money in an incident unrelated to the partnership in which Petitioners had invested. (CR 6 at 74).

After trial, the United States Tax Court issued a Memorandum Opinion finding that Sun Belt's purported purchase of the mobile home park was a sham transaction. (CR 13). The United States Tax Court decision originally was entered on June

13, 1986. (CR 14.) It was subsequently vacated and reentered to correct a typographical error on July 8, 1986. (CR 15.) Pursuant to 26 U.S.C. section 7481 and 7483, the decision of the United States Tax Court became final 90 days later, on October 6, 1986.

On November 12, 1991, Petitioners filed a motion to vacate the prior tax court decision. (CR 17.) Petitioners motion alleged that the attorneys for Petitioners committed a "fraud upon the court" within the meaning of Toscano v. Commissioner, 441 F.2d 930 (9th Cir. 1971). (CR 17 at 2.) Petitioners contended that, at the time Hawkins represented them in the United States Tax Court, he had an outstanding offer with the I.R.S. wherein he would be permitted to return to work at the Internal Revenue Service. (CR 17 at 2.)

The United States Tax Court held an evidentiary hearing on taxpayers' motion to vacate. Petitioner Mrs. Wizbowski testified at the hearing that Hawkins conflict of interest in returning to work with the I.R.S. affected his representation of Petitioners during the course of the Tax Court proceedings. (RT 42-45).

At Petitioners' hearing it was adduced through Hawkins that he had an agreement with Harris to take the lead in the United States Tax Court trial. (RT 24) Hawkins knew when the agreement was made that Harris had put together the sales of the partnerships, which sales were at issue in the United States Tax Court proceedings. (RT 24.) However, at the time that Hawkins allowed Harris to take the lead in the case, he testified that he did not know if he understood the full extent

of Harris' involvement. (RT 25.) Hawkins further testified that as a result, he did not understand if the Petitioners, and all of the other taxpayers who were represented by Harris, were to lose the United States Tax Court case, that Mr. Harris would then be entitled to personal deductions for the claims at issue. (RT 25.)

At the hearing, Petitioner Mrs. Wizbowski testified that she would never tell Hawkins to rely on attorney Harris in representing you in the United States Tax Court case because she was very upset with Harris and had a major conflict with Harris. (RT 42) Mrs. Wizbowski testified that this conflict arose when Harris took $50,000 out of the Petitioners' pension fund. Although the situation with Harris had been resolved prior to the United States Tax Court trial, Petitioners were

not on good terms with Harris prior to the United States Tax Court trial. Petitioner further testified that after this incident with Harris, she could not trust him. (RT 43.)

Despite acknowledging that United States Tax Court Rule 24(f), dealing with conflicts of interest, would apply to Harris, (RT 97) on April 24, 1994, the United States Tax Court denied Petitioners' motion for leave to vacate the 1986 United States Tax Court decision. (Appendix 5.)

On May 12, 1992, Petitioners filed a Notice of Appeal to the Ninth Circuit Court of Appeal. (CR 29.) The United States Tax Court's order denying the motion to vacate was an appealable order pursuant to Section 7459 of the Code. The Court of Appeal had jurisdiction under Section 7482 of the Code.

The Ninth Circuit Court of Appeal affirmed the decision of the United States Tax Court for Petitioners' failure to demonstrate a fraud upon the court. The Ninth Circuit Memorandum Opinion was filed November 29, 1993. (Appendix 1.)

On December 15, 1993, Petitioners filed a Petition for Rehearing before the Ninth Circuit Court of Appeal. (Appendix 10.) Petitioners' requested a rehearing due to the Appellate Court's failure to examine Harris' conflict of interests in deciding whether or not there was fraud on the court in the 1986 United States Tax Court trial. Petitioners argued that by overlooking the material fact of attorney Harris' misconduct, the Court failed to apply the principles enunciated in the Ninth Circuit opinion of Alexander v. Robinson, 882 F.2d 421, (9th Cir. 1989). Petitioners' request for a rehearing was

denied on May 3, 1994. (Appendix 9.)

REASONS FOR GRANTING THE PETITION

The refusal of the courts below to consider whether Harris' representation of the Petitioners constitutes fraud on the court is clear error. Despite a recognition of the United Staets Tax Court that Harris' representation of Petitioners' violated United States Tax Court Rule 24(f), that court, as well as the Court of Appeal refused to consider this factor in determining whether or not the 1986 United States Tax Court decision was procured through fraud on the court.

The clear error of the United Staes Tax Court, in condoning Harris' representation of the Petitioners, and the sanctioning of such judicial conduct by the Court of Appeal call for an exercise of this Court's power of jurisdiction.

Once a decision of the United States

Tax Court has become final as defined in Section 7481 of the Internal Revenue Code, it is well settled, as a general rule, that neither the United States Tax Court nor any other court has jurisdiction to reconsider that decision unless the rendering thereof was the product of fraud upon the court. Lask v. Commissioner, 352 U.S. 1027 (1957) (per curiam), aff'd 235 F.2d 97 (9th Cir. 1956); R. Simpson & Co. v. Commissioner, 321 U.S. 225 (1944); Helvering v. Northern Coal Co., 293 U.S. 191 (1934); Abatti v. Commissioner, 859 F.2d 115, 117 (9th Cir. 1988); Toscano v. Commissioner, 441 F.2d 930 (9th Cir. 1971); Hanover Insurance Co. v. United States 880 F.2d 1503 (1st Cir. 1989), cert. denied, 110 S.Ct. 726 (1990); Kenner v. Commissioner, 387 F.2d 689, 690 (7th Cir. 1968).

Rule 24(f) of the Tax Court Rules of

Practice and Procedure state as follows:

> (f) Conflict of Interest. If any counsel of record (1) was involved in planning or promoting a transaction or operating an entity that is connected to any issue in a case (2) represents more than one person with differing interests with respect to any issue in a case or (3) is a potential witness in a case, then such counsel must either secure the informed consent of the client (but only as to (1) and (2)); withdraw from the case; or take whatever other steps are necessary to obviate a conflict of interest or other violation of the ABA Model Rules of Professional Conduct, and particularly Rules 1.7, 1.8, and 3.7 thereof. The Court may inquire into the circumstances of counsel's employment in order to deter such violations.

Rule 1.7 of the ABA Model Rules of Professional Conduct provides that a lawyer is prohibited from representing a client if the representation of that client will be directly adverse to another client, or the representation of that client may be materially limited by the lawyer's responsibilities to another

client, third parties or the lawyer's own interest.

Harris' representation of the Petitioner's in the 1986 United States Tax Court proceedings constituted a clear conflict of interest and a fraud on the court. Hawkins allowed Harris to take the lead at the United States Tax Court trial. Harris was the creator and promotor of the partnerships involved in the 1986 United States Tax Court proceedings. Petitioner, Mrs. Wizbowski, testified that due to a prior involvement with Harris, Petitioners did not trust him, and would not have involved Harris in their representation.

Harris, as promotor of the partnerships, had his own personal financial interest in the outcome of the United States Tax Court proceedings which was adverse to those of the Petitioners. The main person who could benefit by

Petitioners losing the United States Tax Court case was the lead attorney, Harris. Harris would benefit by the United States Tax Court's determination that the investors had phantom deductions. Harris would then be in a position to show the phantom income from the transaction as bogus, file amended returns claiming an overstatement of income, and requesting a refund. Harris further benefitted from the United States Tax Court decision declaring the partnership transactions as "shams" by retaining sole possession of the property and then selling it at a profit.

It is submitted that the conflicts of interest present in Harris' representation of the Petitioners in the 1986 United States Tax Court proceedings, along with Harris' adverse financial interest in the outcome of the litigation, undeniably constitute a fraud on the court.

Fraud on the court sufficient to justify setting aside a final decision of the United States Tax Court has been defined by the Ninth Circuit as follows:

> "Fraud on the court" should we believe embrace only that species of fraud which does, or attempts to, defile the court itself or is fraud perpetuated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases that are presented for adjudication. Toscano v. Commissioner, 441 F.2d 930, 933 (9th Cir. 1971).

In Bulloch v. United States, 763 F.2d 1115, 1121 (10th Cir. 1985), the court held that fraud on the court is "fraud which directed to the judicial machinery itself and is not fraud between the parties or fraudulent documents, false statements or perjury." Harris' personal financial interest in the outcome of the 1986 United States Tax Court case was not only a fraud perpetuated by an officer of the court, it so affected the judicial

process in this case that the United States Tax Court could not have impartially adjudged the case below. The United States Tax Court itself recognized that Harris' representation of the Petitioners violated Rule 24(f) of the United States Tax Court Rules of Practice and Procedure.

As set forth in Alexander v. Robertson, 882 F.2d 421, 424 (9th Cir. 1989), fraud upon the court is clearly not limited to fraud committed by an "adverse" party. Nor does it require a showing that the party was prejudiced by the misconduct. The Supreme Court has defined fraud on the court in terms of whether the alleged misconduct "harms" the integrity of the judicial process. Hazel-Atlas Glass Co. v. Hartford Empire Co., 322 U.S. 238, 246, 64 S.Ct. 997, 1001, 88 L.Ed 1250 (1944). Furthermore, "since attorneys are

officers of the court, their conduct, if dishonest, would constitute fraud on the court." Kupferman v. Consol. Research & Mfg. Corp., 459 F.2d 1072, 1079 (2d Cir. 1972).

Harris' conduct in the 1986 United States Tax Court proceedings was entirely ignored by the courts below in determining whether fraud on the court existed in the United States Tax Court proceedings.

CONCLUSION

The 1986 United States Tax Court proceedings were procured through fraud on the court, and as such, must be vacated. In denying Petitioners' Motion for Leave to File a Motion to Vacate, the United States Tax Court ignored Harris' obvious conflict of interest. Likewise, the Ninth Circuit Court of Appeal erred in refusing to consider Harris' conduct.

Harris' conduct in the 1986 United

States Tax Court proceedings clearly constituted a fraud on the court in no uncertain terms. The courts below committed clear error in refusing to take into consideration Harris' conflict of interest and adverse substantial financial stake in the litigation.

Dated: _____

Respectfully Submitted,

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